

Article 91.

Appeal to Appellate Division.

**§ 15A-1441. Correction of errors by appellate division.**

Errors of law may be corrected upon appellate review as provided in this Article, except that review of capital cases shall be given priority on direct appeal and in State postconviction proceedings. (1977, c. 711, s. 1; 1995 (Reg. Sess., 1996), c. 719, s. 6.)

**§ 15A-1442. Grounds for correction of error by appellate division.**

The following constitute grounds for correction of errors by the appellate division.

- (1) Lack of Jurisdiction. –
  - a. The trial court lacked jurisdiction over the offense.
  - b. The trial court did not have jurisdiction over the person of the defendant.
- (2) Error in the Criminal Pleading. – Failure to charge a crime, in that:
  - a. The criminal pleading charged acts which at the time they were committed did not constitute a violation of criminal law; or
  - b. The pleading fails to state essential elements of an alleged violation as required by G.S. 15A-924(a)(5).
- (3) Insufficiency of the Evidence. – The evidence was insufficient as a matter of law.
- (4) Errors in Procedure. –
  - a. There has been a denial of pretrial motions or relief to which the defendant is entitled, so as to affect the defendant's preparation or presentation of his defense, to his prejudice.
  - b. There has been a denial of a trial motion or relief to which the defendant is entitled, to his prejudice.
  - c. There has been error in the admission or exclusion of evidence, to the prejudice of the defendant.
  - d. There has been error in the judge's instructions to the jury, to the prejudice of the defendant.
  - e. There has been a denial of a post-trial motion or relief to which the defendant is entitled, to his prejudice. This provision is subject to the provisions of G.S. 15A-1422.
- (5) Constitutionally Invalid Procedure or Statute; Prosecution for Constitutionally Protected Conduct. –
  - a. The conviction was obtained by a violation of the Constitution of the United States or of the Constitution of North Carolina.
  - b. The defendant was convicted under a statute that is in violation of the Constitution of the United States or the Constitution of North Carolina.
  - c. The conduct for which the defendant was prosecuted was protected by the Constitution of the United States or the Constitution of North Carolina.
- (5a) Insufficient Basis for Sentence. – The sentence imposed on the defendant is not supported by evidence introduced at the trial and sentencing hearing.
- (5b) Violation of Sentencing Structure. – The sentence imposed:

- a. Results from an incorrect finding of the defendant's prior record level under G.S. 15A-1340.14 or the defendant's prior conviction level under G.S. 15A-1340.21;
  - b. Contains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level; or
  - c. Contains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class or offense and prior record or conviction level.
- (6) Other Errors of Law. – Any other error of law was committed by the trial court to the prejudice of the defendant. (1977, c. 711, s. 1; 1979, c. 760, s. 3; 1993, c. 538, s. 26; 1994, Ex. Sess., c. 24, s. 14(b).)

**§ 15A-1443. Existence and showing of prejudice.**

(a) A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant. Prejudice also exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible per se.

(b) A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.

(c) A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct. (1977, c. 711, s. 1.)

**§ 15A-1444. When defendant may appeal; certiorari.**

(a) A defendant who has entered a plea of not guilty to a criminal charge, and who has been found guilty of a crime, is entitled to appeal as a matter of right when final judgment has been entered.

(a1) A defendant who has been found guilty, or entered a plea of guilty or no contest to a felony, is entitled to appeal as a matter of right the issue of whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing only if the minimum sentence of imprisonment does not fall within the presumptive range for the defendant's prior record or conviction level and class of offense. Otherwise, the defendant is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of certiorari.

(a2) A defendant who has entered a plea of guilty or no contest to a felony or misdemeanor in superior court is entitled to appeal as a matter of right the issue of whether the sentence imposed:

- (1) Results from an incorrect finding of the defendant's prior record level under G.S. 15A-1340.14 or the defendant's prior conviction level under G.S. 15A-1340.21;
- (2) Contains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level; or

- (3) Contains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level.
- (b) Procedures for appeal from the magistrate to the district court are as provided in Article 90, Appeals from Magistrates and from District Court Judges.
- (c) Procedures for appeal from the district court to the superior court are as provided in Article 90, Appeals from Magistrates and from District Court Judges.
- (d) Procedures for appeal to the appellate division are as provided in this Article, the rules of the appellate division, and Chapter 7A of the General Statutes. The appeal must be perfected and conducted in accordance with the requirements of those provisions.
- (e) Except as provided in subsections (a1) and (a2) of this section and G.S. 15A-979, and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari. If an indigent defendant petitions the appellate division for a writ of certiorari, the presiding superior court judge may in his discretion order the preparation of the record and transcript of the proceedings at the expense of the State.
- (f) The ruling of the court upon a motion for appropriate relief is subject to review upon appeal or by writ of certiorari as provided in G.S. 15A-1422.
- (g) Review by writ of certiorari is available when provided for by this Chapter, by other rules of law, or by rule of the appellate division. (1977, c. 711, s. 1; 1979, c. 760, s. 3; 1981, c. 179, ss. 8, 9; 1993, c. 538, s. 27; 1994, Ex. Sess., c. 24, s. 14(b); 1997-80, s. 4.)

**§ 15A-1445. Appeal by the State.**

- (a) Unless the rule against double jeopardy prohibits further prosecution, the State may appeal from the superior court to the appellate division:
  - (1) When there has been a decision or judgment dismissing criminal charges as to one or more counts.
  - (2) Upon the granting of a motion for a new trial on the ground of newly discovered or newly available evidence but only on questions of law.
  - (3) When the State alleges that the sentence imposed:
    - a. Results from an incorrect determination of the defendant's prior record level under G.S. 15A-1340.14 or the defendant's prior conviction level under G.S. 15A-1340.21;
    - b. Contains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level;
    - c. Contains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level; or
    - d. Imposes an intermediate punishment pursuant to G.S. 15A-1340.13(g) based on findings of extraordinary mitigating circumstances that are not supported by evidence or are insufficient as a matter of law to support the dispositional deviation.

(b) The State may appeal an order by the superior court granting a motion to suppress as provided in G.S. 15A-979. (1977, c. 711, s. 1; 1993, c. 538, s. 28; 1994, Ex. Sess., c. 14, s. 28, c. 24, s. 14(b).)

**§ 15A-1446. Requisites for preserving the right to appellate review.**

(a) Except as provided in subsection (d), error may not be asserted upon appellate review unless the error has been brought to the attention of the trial court by appropriate and timely objection or motion. No particular form is required in order to preserve the right to assert the alleged error upon appeal if the motion or objection clearly presented the alleged error to the trial court. Formal exceptions are not required, but when evidence is excluded a record must be made in the manner provided in G.S. 1A-1, Rule 43(c), in order to assert upon appeal error in the exclusion of that evidence.

(b) Failure to make an appropriate and timely motion or objection constitutes a waiver of the right to assert the alleged error upon appeal, but the appellate court may review such errors affecting substantial rights in the interest of justice if it determines it appropriate to do so.

(c) The making of post-trial motions is not a prerequisite to the assertion of error on appeal.

(d) Errors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division.

- (1) Lack of jurisdiction of the trial court over the offense of which the defendant was convicted.
- (2) Lack of jurisdiction of the trial court over the person of the defendant.
- (3) The criminal pleading charged acts which, at the time they were committed, did not constitute a violation of criminal law.
- (4) The pleading fails to state essential elements of an alleged violation, as required by G.S. 15A-924(a)(5).
- (5) The evidence was insufficient as a matter of law.
- (6) The defendant was convicted under a statute that is in violation of the Constitution of the United States or the Constitution of North Carolina.
- (7) Repealed by Session Laws 1977, 2nd Sess., c. 1147, s. 28.
- (8) The conduct for which the defendant was prosecuted was protected by the Constitution of the United States or the Constitution of North Carolina.
- (9) Subsequent admission of evidence from a witness when there has been an improperly overruled objection to the admission of evidence on the ground that the witness is for a specified reason incompetent or not qualified or disqualified.
- (10) Subsequent admission of evidence involving a specified line of questioning when there has been an improperly overruled objection to the admission of evidence involving that line of questioning.
- (11) Questions propounded to a witness by the court or a juror.
- (12) Rulings and orders of the court, not directed to the admissibility of evidence during trial, when there has been no opportunity to make an objection or motion.
- (13) Error of law in the charge to the jury.
- (14) The court has expressed to the jury an opinion as to whether a fact is fully or sufficiently proved.
- (15) The defendant was not present at any proceeding at which his presence was required.

- (16) Error occurred in the entry of the plea.
- (17) The form of the verdict was erroneous.
- (18) The sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law.
- (19) A significant change in law, either substantive or procedural, applies to the proceedings leading to the defendant's conviction or sentence, and retroactive application of the changed legal standard is required. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, s. 28; 1983 (Reg. Sess., 1984), c. 1037, s. 1.)

**§ 15A-1447. Relief available upon appeal.**

- (a) If the appellate court finds that there has been reversible error which denied the defendant a fair trial conducted in accordance with law, it must grant the defendant a new trial.
- (b) If the appellate court finds that the facts charged in a pleading were not at the time charged a crime, the judgment must be reversed and the charge must be dismissed.
- (c) If the appellate court finds that the evidence with regard to a charge is insufficient as a matter of law, the judgment must be reversed and the charge must be dismissed unless there is evidence to support a lesser included offense. In that case the court may remand for trial on the lesser offense.
- (d) If the appellate court affirms only some of the charges, or if it finds error relating only to the sentence, it may direct the return of the case to the trial court for the imposition of an appropriate sentence.
- (e) If the appellate court affirms one or more of the charges, but not all of them, and makes a finding that the sentence is sustained by the charge or charges which are affirmed and is appropriate, the court may affirm the sentence.
- (f) If the appellate court finds that there is an error with regard to the sentence which may be corrected without returning the case to the trial division for that purpose, it may direct the entry of the appropriate sentence.
- (g) If the appellate court finds that there has been reversible error and the rule against double jeopardy prohibits further prosecution, it must dismiss the charges with prejudice. (1977, c. 711, s. 1.)

**§ 15A-1448. Procedures for taking appeal.**

- (a) Time for Entry of Appeal; Jurisdiction over the Case. –
  - (1) A case remains open for the taking of an appeal to the appellate division for the period provided in the rules of appellate procedure for giving notice of appeal.
  - (2) When a motion for appropriate relief is made under G.S. 15A-1414 or G.S. 15A-1416(a), the case remains open for the taking of an appeal until the court has ruled on the motion. The time for taking an appeal as provided in subsection (b) shall begin to run immediately upon the entry of an order under G.S. 15A-1420(c)(7), and the case shall remain open for the taking of an appeal until the expiration of that time.
  - (3) The jurisdiction of the trial court with regard to the case is divested, except as to actions authorized by G.S. 15A-1453, when notice of appeal has been given and the period described in (1) and (2) has expired.

- (4) Repealed by Session Laws 1987, c. 624.
  - (5) The right to appeal is not waived by withdrawal of an appeal if the appeal is reentered within the time specified in (1) and (2).
  - (6) The right to appeal is not waived by compliance with all or a portion of the judgment imposed. If the defendant appeals, the court may enter appropriate orders remitting any fines or costs which have been paid. The court may delay the remission pending the determination of the appeal.
- (b) How and When Appeal of Right Taken. – Notice of appeal shall be given within the time, in the manner and with the effect provided in the rules of appellate procedure.
- (c) Certiorari. – Petitions for writs of certiorari are governed by rules of the appellate division. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, s. 29; 1987, c. 624; 1989, c. 377, s. 5.)

**§ 15A-1449. Security for costs not required.**

In criminal cases no security for costs is required upon appeal to the appellate division. (1977, c. 711, s. 1.)

**§ 15A-1450. Withdrawal of appeal.**

An appeal may be withdrawn by filing with the clerk of superior court a written notice of the withdrawal, signed by the defendant and, if he has counsel, his attorney. The clerk must forward a copy of the notice to the clerk of the appellate division in which the case is pending. The appellate division may enter an appropriate order with regard to the costs of the appeal. (1977, c. 711, s. 1.)

**§ 15A-1451. Stay of sentence; bail; no stay when State appeals.**

- (a) When a defendant has given notice of appeal:
- (1) Payment of costs is stayed.
  - (2) Payment of a fine is stayed.
  - (3) Confinement is stayed only when the defendant has been released pursuant to Article 26, Bail.
  - (4) Probation or special probation is stayed.
- (b) The effect of dismissal of charges is not stayed by an appeal by the State, and the defendant is free from such charges unless they are subsequently reinstated as a result of the determination upon appeal. (1977, c. 711, s. 1.)

**§ 15A-1452. Execution of sentence upon determination of appeal; compliance with directive of appellate court.**

- (a) If an appeal is withdrawn, the clerk of superior court must enter an order reflecting that fact and directing compliance with the judgment.
- (b) If the appellate division affirms the judgment in whole or in part, the clerk of superior court must file the directive of the appellate division and order compliance with its terms.
- (c) If the appellate division orders a new trial or directs other relief or proceedings, the clerk must file the directive of the appellate court and bring the directive to the attention of the district attorney or the court for compliance with the directive. (1977, c. 711, s. 1.)

**§ 15A-1453. Ancillary actions during appeal.**

(a) While an appeal is pending in the appellate division, the court in which the defendant was convicted has continuing authority to act with regard to the defendant's release pursuant to Article 26, Bail.

(b) The appropriate court of the appellate division may direct that additional steps be taken in the trial court while the appeal is pending, including but not limited to:

- (1) Appointment of counsel.
- (2) Hearings with regard to matters relating to the appeal.
- (3) Taking evidence or conducting other proceedings relating to motions for appropriate relief made in the appellate division, as provided in G.S. 15A-1418. (1977, c. 711, s. 1.)

**§ 15A-1454. Reserved for future codification purposes.**

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